Hagar Management Corp. and 1025–1045 Associates, Inc. *and* Wilfredo Arteaga *and* Venicio Bonilla *and* United Service Employees Union Local 377, R.W.D.S.U., AFL–CIO

1025–1045 Associates, Inc. *and* Local 32B–32J. Cases 29–CA–15842, 29–CA–15907, 29–CA–15967, 29–CA–15966, and 29–CA–15945

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

In September 21, 1992, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record[1] in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents Hagar Management Corp. and 1025-1045 Associates, Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondents have moved to reopen the record to reconsider the credibility of Anthony Mitchell in light of the Respondents' allegation that he attempted fraud by underreporting interim earnings in settlement negotiations. The motion is denied to the extent that it seeks to attack the judge's credibility resolutions. *Kenai Helicopters*, 235 NLRB 931 fn. 1 (1978).

The Respondents further contend that, in any event, Mitchell's alleged fraud should be considered in connection with the judge's recommended reinstatement remedy. We find no merit in this contention. The Respondents' allegations, even if true, do not *automatically* compel a finding that reinstatement should be barred. *Owens Illinois*, 290 NLRB 1193 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989). The impact of the alleged fraud on the remedy is a matter best left to the compliance stage of these proceedings. See, e.g., *United Supermarkets*, 291 NLRB 314 (1988).

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

James Patrick Kearns, Esq., for the General Counsel.
Martin Gringer, Esq. (Franklin & Gringer, P.C.), of Garden City, New York, for the Respondents.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on April 6 and 9, 1992. The complaint alleges that Respondent, in violation of Section 8(a)(1), (3), and (5) of the Act, promised its employees money to induce them to resign, discharged its employees, harassed its employees, and refused to bargain with Local 32B-32J. Respondent denies the material allegations of the complaint and alleges that one of the individuals was a supervisor, that certain of the employees engaged in an unprotected strike, and that there is no obligation to bargain on the part of the Employer.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in June 1992, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Associates, a New York State corporation with its principal office in Brooklyn, New York, owns an apartment house at 1025-1045 St. John's Place in Brooklyn. Respondent Hagar, a New York corporation with its principal office in Brooklyn, New York, is engaged in providing building management services; it manages the building at 1025-1045 St. John's Place. Respondents Associates and Hagar admit, and I find, that they are joint employers of the employees at 1025-1045 St. John's Place and that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondents admit, and I find, that United Service Employees Union Local 377, R.W.D.S.U., AFL–CIO and Local 32B-32J, Service Employees International Union, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Prior to the time relevant to this proceeding, the building at 1025-1045 St. John's Place had been owned by Blue Star Realty, Inc. and the employees had been represented by Local 32B-32J.[1] One superintendent, Anthony Mitchell, and one porter, Courtney Thompson, were employed to care for the building. On April 23, 1991, the building was purchased by Respondent Associates. At the time of purchase by Associates, the employees of Blue Star were retained. Respondents admit that Associates and Hagar entered into a contract whereby Hagar would manage the building. Ralph Sperlin is the president of Associates, and the parties agree that he is an agent of Respondents and a supervisor under the Act. Ralph Sperlin's son, Dovie Sperlin, is the vice president of Associates. The only principal of Hagar identified in this proceeding is Lazar Hagar; his title was not specified here.

The gravamen of the General Counsel's case is that Ralph Sperlin discharged Mitchell and Thompson because they be-

[1] The most recent collective-bargaining agreement between Blue Star and Local 32B-32J had a term from April 21, 1988, to April 20, 1991.

longed to Local 32B-32J, and that Sperlin then proceeded to discharge the new superintendent and porter he hired, two men by the names of Wilfredo Arteaga and Venicio Bonilla, because they joined Local 377. Respondent asserts that Thompson was discharged because he engaged in destructive actions during a 1-day strike at the building and that Mitchell resigned after trying to secure a lump sum payment from Ralph Sperlin.[2] Respondent maintains that Arteaga was fired because he was inattentive to his duties and that Bonilla left his job voluntarily.

Local 32B-32J engaged in a citywide strike beginning on April 20, 1991. At first, only buildings in Manhattan were actually struck, and later the strike was extended to buildings in the other boroughs within the Local's jurisdiction. The testimony here shows that employees in Brooklyn did not walk off the job until at least the 10th day of the strike. As far as the building at 1025-1045 St. John's Place is concerned, the employees struck for 1 day only, on May 2, 1991.

B. *The Facts*

1. Anthony Mitchell and Courtney Thompson

Anthony Mitchell testified that he was hired by Blue Star Realty in 1986 as a resident, working superintendent. He made repairs and did plumbing and electrical work. He worked from 8 a.m. to 5 p.m. Monday through Friday and was on call for the rest of the time. Courtney Thompson was employed as a porter before Mitchell was hired and thus Mitchell did not train Thompson. Mitchell testified that he never hired, fired, transferred, suspended, laid off, recalled, nor promoted employees. Mitchell did not give raises, he did not mete out discipline, and he did not settle grievances. Vacations and other times off were approved by the management office. Mitchell testified that when Blue Star owned the building, a supervisor from the Company came to the building as often as once a day but that sometimes 2 weeks would pass without a visit from the supervisor. Mitchell acknowledged that he was responsible for the building on a daily basis. As to the degree of supervision he exercised over Thompson, Mitchell claimed that if he got complaint about dirt he would pass it along to Thompson; otherwise he did not give Thompson daily instructions. Mitchell testified that if tenants requested repairs, he had to obtain permission to make the repair from the management office. The testimony of Mitchell and Ralph Sperlin shows that once Respondent purchased the building, Sperlin came to the premises several times a week. I find that Mitchell was not a supervisor within the meaning of the Act. *Elias Mallouk Realty Corp*., 265 NLRB 1225, 1234 (1982).

Mitchell met first Ralph Sperlin while showing Sperlin the premises before the latter bought the building. After the purchase was completed, according to Mitchell, Sperlin spoke to him in the lobby and said it was his policy ''to clean the house.''[3] Mitchell replied that he was in the Union and that he would do whatever the Union said. Sperlin said that he would not abide by the union contract because the contract applied to the previous owner. That day or the next, Ralph Sperlin asked Mitchell to report to his office. There, Mitchell met Lazar Hagar, the managing agent. Hagar told Mitchell that he had to leave the premises because it was the policy to clean house. Hagar asked Mitchell how much money he wanted in order to ''settle as a gentleman'' without having to go to court. Mitchell responded that he would have to consider the matter and consult with his family and legal advisor. The next day Hagar called Mitchell and offered him $3000; when Mitchell said he would consider it, Hagar offered $6000. Mitchell refused this sum and Hagar then offered $8000 as a final figure. Hagar stated that he had to ''twist Mr. Sperlin's hand'' to reach that figure. Mitchell responded that he would speak to his legal advisor. At some time later, Sperlin came to the building. He remarked to Mitchell that his union president makes over half a million dollars a year and that Sperlin ''would not allow him to get fat off his back.''[4] Sometime after this conversation, Sperlin again came to the building and handed Mitchell a form of release which he suggested Mitchell should take to an advisor.[5] Mitchell decided not to sign the release and he informed Sperlin of his decision the next day. According to Mitchell, Sperlin was very angry and he remarked that he did not ''want any black working around.''[6] Sperlin said that Mitchell was fired and should vacate the super's apartment. After this conversation, Mitchell went to the unemployment office believing that he had been fired.[7]

On cross-examination, Mitchell maintained that he was fired before he refused to sign the release; he was not being paid and he considered himself fired. When Mitchell was shown a check dated May 17, he stated that this was ''a back check.'' He could not recall when he received the check but he claimed that it represented 2 weeks' pay that Respondent owed him and that Sperlin had initially refused to pay him. Mitchell acknowledged that before Respondent had the release drawn up, he had told Sperlin that he was going to take $8000. This was sometime after the strike, but Mitchell could not recall when it was. He was also unable to recall how much time elapsed between the time he told Sperlin he agreed to leave for $8000 and the day Sperlin gave him the release.

The evidence shows that on April 30 or May 1 Mitchell and Thompson had gone to the strike office established by Local 32B-32J in Brooklyn and they had seen Philip Papane, a business agent. Mitchell and Thompson wanted to know when they should strike. Apparently, they were not told to strike immediately, but Papane gave them leaflets to hand out to tenants informing the tenants that they could apply for rent reductions due to lack of service.[8] Papane's testimony shows that Mitchell told him that the building had a new

[2] Respondent also urges that Mitchell was a supervisor.

[3] Mitchell could not recall exactly when this occurred but he testified that it was before the strike at the building.

[4] During the strike, this figure had been reported in the newspapers.

[5] The release bears a fax number and date which shows that it was faxed to Sperlin by counsel for Respondent on May 23, 1991. The date appearing next to the signature line is May 24, 1991.

[6] Mitchell is black.

[7] Mitchell applied for unemployment on May 29, 1991. Mitchell's affidavit states that he was fired about May 15, and after this Sperlin gave him a release to sign whereby he would resign in return for a payment of $8000.

[8] Papane denied telling Mitchell and Thompson that in the event they struck the building they should shut off the elevator and hot water service to the tenants, but apparently the Union believed that services would be reduced in the event of a strike.

owner but that Mitchell did not inform him that the new owner had asked him to resign.[9]

On May 2, 1991, the Union told Mitchell that he and Thompson should strike. According to Mitchell, he did not perform his regular duties that day: instead, he checked the hot water and the boiler and saw to it that the tenants had hot water and elevator service. Mitchell testified that when the strike began, Thompson nailed the incinerator doors closed by placing nails into the door jambs.[10] This prevented tenants from putting garbage in the chutes which might become clogged if the strike were to be prolonged; tenants were obliged to carry the garbage down by hand. Mitchell testified that nails had been used before this occasion to secure the incinerator doors and that this method did not damage the doors but merely left a nail hole.

Mitchell testified that on the day of the strike an agent of the Environmental Protection Agency came to the building and Mitchell had to cut a lock on the basement door so that the agent could gain access to the basement. According to Mitchell, he did not have keys to the locks because Sperlin had changed the locks for the elevator, the boiler, and for ''everything,'' without giving Mitchell new keys. On cross-examination, Mitchell could not recall whether Sperlin had changed the locks immediately after he bought the building or only after the strike had occurred. Mitchell denied that on the day of the strike he had locked the basement so that the owners had no access to the basement and could not turn on the boiler or provide elevator service. Mitchell denied threatening to damage the building if Sperlin tried to open the basement.

A further event relevant to the issue of Mitchell's status occurred in April 1991. According to Mitchell, on the first day Sperlin owned the building, he brought Arteaga and Bonilla with him and installed them in an empty apartment. The men began to clean the basement. Arteaga told Mitchell that he was the new super. Mitchell denied that Sperlin introduced Arteaga to him as a contractor who had been hired to clean out the basement and renovate some apartments. As is described more fully below, Arteaga testified that Ralph Sperlin hired him as the new super.[11] Arteaga's first duties consisted of fixing the apartment where he lived. When he moved in, Sperlin gave him the keys to the building and told him he was beginning as the super. Arteaga was paid $500 every 2 weeks and he occupied a rent free apartment. Mitchell and Thompson continued working in the building for 3 weeks. During that time, Arteaga worked with Thompson and Bonilla taking debris out of the basement and then painting the basement.

Arteaga testified that he had been at the building about 3 weeks when he saw the employees picketing in front of the building during the 1-day strike. Arteaga, as was his custom, called Sperlin at 7 a.m. on the day of the strike. He told Sperlin that everything was fine. About half an hour later, Arteaga went down to the basement and saw that the basement doors were locked with chains and padlocks. He called Sperlin a second time to inform him of that fact. Arteaga testified that the elevators were working and that there was hot water in the building; however, Arteaga's car had been vandalized. Arteaga noticed that the incinerator doors were nailed shut on the day of the strike; one nail was placed at the top of each door and one at the bottom.

Porter Courtney Thompson testified that he first met Ralph Sperlin on the day of the strike. According to Thompson, Mitchell was there too. Sperlin spoke about a deal he was proposing to Mitchell and Thompson. He said he knew they were in the Union. He offered to give Thompson $3000 and he offered $5000 to Mitchell to walk away from the job. Sperlin said he did not want any black people working for him. Thompson asked Sperlin why he said that and he remarked that he had worked for the prior owner for many years, but Mitchell made no comment. Sperlin said ''that's the way it got to be, that's the way I feel.'' Thompson told Sperlin that he would accept Sperlin's proposal if the Union told him to do so. Thompson testified that Sperlin said the building does not ''make that kind of money . . . so he can't pay us that kind of a salary.'' The next day, Thompson and Mitchell spoke about Sperlin's offer; they wondered why Sperlin would offer them money ''behind the Union.'' They agreed it was not right and they could not make the deal. Thompson testified that Ralph Sperlin discharged him one day at 8 a.m. Sperlin handed him a letter and Thompson said he would have to take it to his union.

On cross-examination, Thompson testified that before he began picketing on the day of the strike he took 15 minutes to nail shut the doors to the incinerator chute because he did not know how long the strike would last. He placed one nail in each door. According to Thompson, the door was not damaged because he drove the nails into existing holes left there by a contractor who had renovated the compactors in the basement. Thompson testified that no one instructed him to nail the incinerator doors shut. Although Thompson testified that the elevators were running that day, he stated that he went up and down the stairs to reach all 24 incinerator doors in the building because is was easier and faster to go up the stairs. Thompson used his own tools which he carried in his lunch box.

Dovie Sperlin testified that on the morning of May 2 Arteaga called to tell him that the employees were on strike and that they were nailing the incinerator doors shut, that the hot water was off, and that there was no elevator service. Arteaga also claimed that the strikers had smashed his windshield and flattened a tire on his car. In addition to Arteaga's call, Dovie Sperlin received complaints from tenants that morning. Both Dovie and Ralph Sperlin went to the building, arriving at about 8 a.m. Arteaga met them in front of the building; he showed them the damage to his car and then accompanied them into the building where they saw Thompson in the process of nailing shut the incinerator doors. They

[9] Papane also testified that he never requested that Associates or Hagar bargain with the Union nor did he send any notice to the FMCS or the New York State Board of Mediation (State Board) that the Union had a labor dispute with the new owner.

[10] In the past, the building had been equipped with garbage chutes leading to an incinerator. Due to air pollution regulations, incinerators in New York City have been banned from operation. As a result, the chutes have been linked to a garbage compactor. For some reason, all the witnesses referred to incinerator chutes, thus recalling the outmoded function of the chutes rather than their actual use as part of a compactor system.

[11] Arteaga is Spanish speaking and so is Bonilla. Their friend Victor Soto recommended them to Sperlin and they went to Soto's apartment to meet Sperlin on the day Sperlin hired them to work in his building. Soto translated during the conversation among Arteaga, Bonilla, and Sperlin. Soto is a superintendent in another building owned by Sperlin.

asked him what he was doing but Thompson made no response.[12] Ralph Sperlin recalled that he and his son had to walk up four flight of stairs to find Thompson; the elder Sperlin is a heart patient and he found this a difficult climb. Dovie Sperlin testified that he saw that the doors to the basement were chained and locked. He asked Mitchell to open the locks to the basement so that Arteaga could continue working on the basement, but Mitchell responded that Sperlin should get out of there because if Sperlin tried to enter the basement Mitchell would do more damage to the building. The Sperlins then called Victor Soto and eventually had the locks cuts off.[13] When Dovie Sperlin finally gained access to the basement 2 hours later, he saw that the elevator switch was off and that the elevator cabs had been brought down to the basement. Ralph Sperlin called Tri-State Elevator to restore elevator service to the building. Dovie Sperlin went into a tenant's apartment and tried to run the hot water; there was none. After the Sperlins gained access to the boiler room, they saw that the boiler had been turned off. Ralph Sperlin turned the boiler back on and then he placed his own lock on the boiler room; later that day, Mitchell cut that lock off in order to enter the boiler room with the EPA inspector.

Ralph Sperlin testified that he spoke to Mitchell twice before May 1, 1991. The first conversation took place in the building before Sperlin had closed on the property when Mitchell was showing him the premises; this discussion did not involve any mention of unions. The second conversation took place at the end of April when Sperlin went around the building giving out rent receipts for May.[14] As he was finishing, Mitchell came into the building and Sperlin told him he was the new owner. There was no mention of unions during this conversation. Sperlin testified that he had been aware when he purchased the building that the former owners had a contract with Local 32B-32J. Sperlin denied telling Mitchell that it was his policy to clean out the house and hire new people whenever he bought a building. This is not Sperlin's policy.

Ralph Sperlin denied offering Thompson and Mitchell a sum of money on the day of the strike. Sperlin testified that he decided to terminate Thompson because he had caused damage to the building during the strike. He engaged a security company to protect the property from further damage; Sperlin waited until May 13 to fire Thompson and the security company came to the building beginning May 14. Sperlin did not explain the delay between the events of the strike and the hiring of the security company. Sperlin testified that he gave Thompson a letter of discharge and a check. Sperlin stated that he never told Thompson that he was fired because he was a union member and he never discussed the Union with Thompson. He specifically denied telling Thompson that he did not want to pay him his wages because he was black nor did he comment on Thompson's race.[15]

Ralph Sperlin testified that after he discharged Thompson, Mitchell initiated a conversation during which Mitchell asked Sperlin how much the latter would pay him to resign. Sperlin testified that he would have been happy to have Mitchell's resignation because he had shut down the elevators and the boiler on the day of the strike.[16] On May 18 or 19, 1991, Sperlin offered Mitchell $3000. Mitchell said he would consider the offer. A few days later, Ralph Sperlin again saw Mitchell in the lobby and Mitchell asked if Sperlin would raise his offer. Sperlin testified that he offered him $5000 or $6000 at that time, but Mitchell said that was not enough. A few days after this, Sperlin saw Mitchell in the lobby and Mitchell asked for $10,000 in return for his resignation. Sperlin replied that if he would take $8000 they could reach a settlement. Mitchell agreed to this figure. Sperlin asked his attorney to draw up a form of release for Mitchell to sign in exchange for the $8000. He also spoke to Arteaga about becoming the superintendent on May 23 or 24. On May 24, 25, or 26, Sperlin gave the release papers to Mitchell. On May 27, Sperlin and his family left for California to attend a wedding. When Sperlin returned on June 2, he telephoned Mitchell who told him that he would not sign the papers.

Ralph Sperlin testified that he never fired Mitchell but that after Mitchell refused to sign the release he ceased performing the duties of the superintendent. When the unemployment insurance division wrote to Sperlin about Mitchell, Sperlin told them that Mitchell had resigned. Sperlin testified that he never had any conversation with Mitchell about Local 32B-32J. He denied telling Mitchell that he did not want to pay certain sums of money to a black person.

Sperlin testified that he hired Arteaga and Bonilla as contractors to clean out the basement and to renovate an apartment Sperlin gave to Arteaga. Arteaga made the repairs to the apartment and moved into it on May 3 or 4, 1991. Sperlin testified that he offered Arteaga $500 as ''base pay'' and more money if he did additional work. He gave Arteaga $400 for a helper. According to Sperlin, on May 23 or 24, he offered Arteaga the job of superintendent and Bonilla the job of porter.[17]

2. Discussion and conclusions as to Mitchell and Thompson

It is apparent that in order to resolve the issues surrounding the departures of Mitchell and Thompson from employment, I must resolve numerous issues of credibility. This is not a simple task. Mitchell was unable to recall dates and he was sometimes unable to recall when events took place in relation to each other. Thompson testified that Sperlin made certain offers to him but Mitchell did not testify to these conversations. Ralph Sperlin testified in response to leading questions and his answers were not always consistent. He gave different versions of events at different times. My observation of Ralph Sperlin leads me to conclude that he did not recall all the facts to which he was testifying and that leading questions were used because Sperlin was not capable of stating the events without such an aid. Further, neither

[12] Ralph Sperlin's testimony about this incident was to the same effect.

[13] The union to which Soto belongs was not on strike.

[14] It appears that Sperlin meant that he was giving out bills for the rent due May 1, 1991.

[15] Sperlin testified that the residents of the building are 106 black families.

[16] Sperlin later changed his testimony and testified that he asked Mitchell if he was interested in resigning: at first Mitchell refused but then he asked Sperlin to make an offer. Sperlin testified that he offered Mitchell $8000 because he threatened to destroy the building.

[17] Sperlin testified that he dealt with Arteaga in all matters and that Arteaga then relayed any necessary information to Bonilla.

Lazar Hagar nor Victor Soto testified. Although it was stated that Hagar is in Israel, there was no showing that Respondent had attempted to secure his attendance at the instant hearing. No explanation was given for Soto's failure to testify on behalf of Respondent. Because Soto translated for Ralph Sperlin when he hired Arteaga and Bonilla, his testimony would have shed light on the actual purposes for which Arteaga and Bonilla were hired. On the record as it stands, the allegations about statements made by Hagar stand unrefuted, and Arteaga's testimony about what Soto translated to him concerning his hiring by Sperlin are also unrebutted by the only person who actually communicated with Arteaga in the language he spoke well.

Having reviewed the evidence and having weighed the demeanor of the witnesses, I have concluded that the testimony of Mitchell and Thompson should be credited. Mitchell's testimony about Sperlin's wish to ''clean house'' and the conversations during which Ralph Sperlin and Hagar tried to induce him to resign have the ring of truth. I believe that Sperlin told Mitchell of his outrage that the Local 32B-32J president earned half a million dollars per year and that Sperlin told Thompson and Mitchell that the building did not bring in enough money to continue paying them at the union rate and that he did not intend to abide by the union contract. Further, I credit Arteaga's testimony that Sperlin told him he would be the super. Sperlin began by giving Arteaga a rent free apartment; this is a strong indicator that Arteaga was intended to be the resident superintendent. Further, Ralph Sperlin testified that he was giving Arteaga $500 as ''base pay'' plus additional sums for extra work. This formulation generally applies to a superintendent who is to perform work over and above his normal duties in the building. Finally, the explanation given by Ralph Sperlin for the firing of Thompson 2 weeks after his alleged destruction in the building and the negotiations with Mitchell does not make any sense and has all the earmarks of a pretext. If Thompson was to be fired for putting nail holes in garbage chutes, this could have been done immediately. Thompson did not reside in the building and if he had been barred from the premises he could have engaged in no acts of sabotage. If it was indeed judged necessary to hire a security service, then it has not been shown why Respondent waited until May 14 to do this and permitted the supposedly destructive Thompson to work in the building until then.[18] Ralph Sperlin's testimony that Mitchell approached him and sought to negotiate a severance payment is similarly unpersuasive. At first, Sperlin said Mitchell approached him but then Sperlin testified that he himself sought Mitchell's resignation because the latter threatened sabotage. No reason has been intimated why a long-serving resident superintendent with the protection of a union should suddenly decide to resign for a relatively small sum such as $8000: the only explanation is that the boss was trying to force him out and had already fired the porter. If Mitchell had indeed wanted to resign but then changed his mind, no reason has been shown why he would stop performing his duties and risk losing his job. I do not find it conclusive that Mitchell and Thompson did not inform the union business agent that Respondents wished to be rid of them. The evidence shows that the two men went to a strike headquarters for the purpose of obtaining information about their actions during the strike. It is understandable that they did not raise any other subjects at that time. I observed that Mitchell and Thompson were relatively unsophisticated men who might not have thought to tell the Union about anything unrelated to the strike.

I credit the testimony of Mitchell and Thompson and I do not credit the testimony of Ralph Sperlin. I find that before the strike, Ralph Sperlin and Lazar Hagar had told Mitchell that they wanted to ''clean house'' and that they could not afford to pay union wages. Sperlin told Mitchell that he would not abide by the union contract. Sperlin told Thompson that he knew Thompson was in the Union and that he would pay him $3000 to walk away. I find that Ralph Sperlin expressed his antiunion animus when he was trying to obtain Mitchell's resignation and said that the union president earned a large sum but that Sperlin would not permit the president to get fat off his back.

I find that, in furtherance of Sperlin's expressed intention to clean house and to rid himself of the burden a union contract, Ralph Sperlin hired Arteaga and Bonilla to replace Mitchell and Thompson. I find that Respondent discharged Thompson because he belonged to and supported Local 32B-32J. I find that Respondent cited as a pretext the fact that Thompson nailed the garbage chute doors during the strike.[19] Ralph Sperlin seized on the nails to justify the discharge 2 weeks after the day of the strike; this pretext had the further consequence of relieving Sperlin of his efforts to offer Thompson money in exchange for his resignation. The testimony about the nail holes convinces me that they were small and inconspicuous and did not cause any damage to the building. I find that Respondent discharged Mitchell because he belonged to and supported Local 32B-32J. I do not credit the testimony that Mitchell ceased performing his duties and resigned: Mitchell was told that he had to go because Sperlin could not afford to pay him union wages and he was offered a payment of $8000. Mitchell was fired but Sperlin continued to negotiate with him in the hope of avoiding litigation. Eventually, Mitchell contacted the unemployment office. By offering Mitchell and Thompson sums of money to induce them to resign, Respondent violated Section 8(a)(3) and (1) of the Act. Respondent further violated Section 8(a)(3) and (1) by discharging Mitchell and Thompson.

3. Wilfredo Arteaga and Venicio Bonilla

Arteaga testified that Ralph Sperlin hired him and said that he would be the superintendent in the building. His first duties consisted of fixing the apartment where he was to live.

[18] I note that despite all the testimony by Ralph and Dovie Sperlin about the purported lack of elevator and hot water service to the building on the day of the strike, Respondents do not maintain that Mitchell was fired for these alleged failings. Similarly, there is no testimony that Mitchell was discharged for locking the basement or for cutting a lock to admit the EPA inspector. Therefore, there is no reason for me to resolve the issue whether the service was halted and if so by whom; nor need I determine whether Mitchell engaged in misbehavior in respect to the basement locks. However, I do not consider Dovie Sperlin to be a reliable witness. He testified in a manner which led me to conclude that he was exaggerating and his testimony was not always consistent with that given on the same matters by Ralph Sperlin.

[19] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As a super, Arteaga was paid $500 every 2 weeks and he had a rent free apartment.[20] Ralph Sperlin assigned Arteaga his daily tasks every morning. Arteaga said that his duties as the super involved attending to problems in the apartments. Tenants would notify him of needed repairs directly or through the management office. Arteaga hired a painter for 1 day at Sperlin's direction. Arteaga testified that he never transfered, suspended, laid off, recalled, promoted, fired, nor disciplined employees. He did not grant any raises. There is no evidence that Arteaga was a statutory supervisor.

Arteaga testified that the boiler room flooded in the early morning of May 31, 1991, when a rainstorm caused the drain pipes to become clogged. The pump in the basement was not working and, at daybreak, Arteaga called Hagar who instructed him to get a pump from Soto. As a result of the flood, the boiler, the elevators, the oil burner, and the hall lights were all out of order. Arteaga claimed that the flood occurred early Sunday morning and that he called Hagar the next day, on Monday morning.[21] He had tried calling Sperlin at home but the latter's ''wife'' said he was out of town and that he should call Hagar.[22] Arteaga did not have Hagar's home number.

On June 10, 1991, Sperlin called Arteaga to a meeting where Victor Soto again acted as translator. At that meeting, Sperlin said that he was unhappy with Arteaga's services because he did not work Saturday and Sunday. Although Arteaga protested that he was not supposed to work on weekends, Sperlin said that he had been given an apartment for that purpose. Sperlin explained that Arteaga did not have to perform work in the building, but that he had to be available in case of emergency and he had to see whether people moved into or out of the building. Sperlin told Arteaga that his job was in jeopardy. It is clear from Arteaga's testimony and his affidavit that he was unhappy that Sperlin expected him to be on call during the weekend and that he resented the fact that Sperlin often called him to make sure he was in the building and that everything was in order. Arteaga admitted that on this occasion Sperlin mentioned the fact that he should look for another job; as will be seen below, Sperlin maintains that he told Arteaga that he could not remain as the super past the end of the month.

Arteaga testified that he had been discussing the pressures he felt on the job with a friend who advised him to call Local 377 for assistance. Arteaga testified that he called the Local on June 19, 1991, and he went to the union hall on June 22, 1991, to speak to Frasca who gave him three authorization cards. According to Arteaga, he filled out a card and paid $100 to Local 377 when he returned the card on June 28. On that day, Frasca advised him to keep working and said that Local 377 would write to Sperlin saying that Arteaga was protected by the Union. Sometime later, apparently July 2 or 4, according to Arteaga, he went with porter Bonilla to Local 377 so that Bonilla could hand in his completed authorization card. Arteaga's version of these events changed on cross-examination when he stated that he went to Local 377 on June 28, 1991, and that about a week later he returned a signed card to the Union and then informed Bonilla that he had become a member. At this time, Arteaga offered Bonilla an authorization card. After giving this second version of the signing, Arteaga sought to change his testimony again. His answers became nonresponsive and with each answer the story changed and changed again. I must conclude that Arteaga's testimony about when and how he signed a card for Local 377 is unreliable. The Local 377 authorization cards that were admitted into evidence show that Bonilla's card was received by the Union on July 8, 1992, and that Arteaga's was received on July 15, 1991.

Arteaga testified that he worked on July 4, 1991, because Sperlin had told him it was not a holiday for him.[23] On July 5, Arteaga and Bonilla were in the lobby of the building when Ralph Sperlin appeared and accused Arteaga of not having been present the day before. Arteaga protested that he had indeed been at work. Then Sperlin asked to see Arteaga's residency card. After being shown Arteaga's card, Sperlin told him that it was ''false.''[24] Arteaga testified that he next spoke to Sperlin on July 6, 1991.[25] Arteaga was in the basement with a boiler repairman and Sperlin came in the morning and was ''strange.'' He told Arteaga, ''you brought the union in to my building.'' Then Arteaga told Sperlin that he needed material to fix an apartment, but Sperlin said he was not interested in that. Ralph Sperlin told Arteaga that he had a lot of problems; tenants were complaining that there was no hot water and no water pressure. Arteaga replied that water pressure in the building was bad. Later that day, Arteaga spoke to Sperlin again in the basement. Sperlin asked Arteaga for the keys, saying that he no longer wanted Arteaga to work in the building. Arteaga asked for a letter stating the reasons for his discharge, but Sperlin refused and said that he would send the immigration agents and the police to see Arteaga. Sperlin said it was his building and he could do what he wished; Arteaga could call the Union if he chose. The next day, Soto called Arteaga and asked for the keys, but Arteaga would not give them up unless Sperlin gave him a letter. At some point, according to Arteaga, he saw Sperlin and asked him for 2 weeks' pay. Arteaga did not work in the building after that time, but he remained in his apartment. On July 8, Arteaga saw Sperlin again and the latter asked him to pay rent for the apartment.

On cross-examination, Arteaga testified that he has held various jobs in construction. Arteaga testified that the time he was hired by Sperlin, he had been engaged for about 1 year in fixing up the premises occupied by his church, and that he spent 15 to 20 hours per week on this task. Later, he changed his testimony to say that he began work on the church only in September 1991. Although he resisted admitting the fact until he was confronted with his business card, Arteaga acknowledged that he has had his own construction company during the period relevant to the instant proceeding. The record shows that Ralph Sperlin suspected that Arteaga was not doing his work in the building because he was busy

[20] When Arteaga received his pay, he also got $400 in cash to give to Bonilla for his services as a porter. Bonilla was also given a room in the basement.

[21] May 31 was a Friday. The correct date for Sunday is June 2, 1991.

[22] Arteaga claimed that the woman who answered the phone said she was Sperlin's wife.

[23] July 4, 1991, fell on a Thursday.

[24] On cross-examination, Arteaga changed his testimony to say that Sperlin asked to see his residency card before July 4th.

[25] This was a Saturday. It is clear that Arteaga is wrong about the day he spoke to Sperlin. Sperlin and his son are Orthodox Jews and do not transact any business on Saturday. It is clear to me that Ralph Sperlin was not at the building on July 6, 1991.

with his construction company and especially with work in his church.

On July 19, 1991, after he was fired, Arteaga spent the hours from 7 to 11 p.m. in church. A faucet was left open in Arteaga's apartment and Arteaga's apartment as well as others in the building were flooded.

Venicio Bonilla testified that at the end of June or beginning of July, Arteaga discussed Local 377 with him and asked Bonilla if he wished to become a member of the Union. At first, Bonilla said no, but on Arteaga's second request a day later Bonilla agreed to join Local 377. This was around July 3 or 7.[26] Bonilla testified that he decided to join the Union in order to be protected from losing his job.

Bonilla testified that in early August, he noticed some documents, including a receipt from Local 377, missing from the basement room where he lived. After that, according to Bonilla, Sperlin stopped speaking to him. Bonilla testified that on August 6, Samuel, the new super, said he would be fired on August 8 because Bonilla had been at the Union.[27] Sperlin was not present on this occasion. Then, Bonilla changed his testimony to say that Sperlin was present and that Samuel translated Bonilla's question why he was being fired. According to Bonilla, Sperlin said in English, ''you problem, the union.''

On cross-examination, Bonilla acknowledged that his affidavit given to a Board agent stated that the thief had stolen his social security card but had left the union receipt. Bonilla explained that he looked later and saw that the receipt from Local 377 was missing. Bonilla's affidavit states that he did not work on July 4 but went to pick up his cousin at the airport. According to the affidavit, Sperlin was angry and right after this Bonilla went to the Local 377 office and signed an authorization card. Bonilla, who speaks only Spanish, repeatedly testified that Sperlin said to him in English, ''you problem, the union.'' I noted that Bonilla apparently was able to say these four words whenever he was questioned about Sperlin.

Salvatore Frasca, the financial secretary-treasurer of Local 377, testified that Arteaga visited him in June 1991, signed a card, and paid his initiation fee. Frasca stated that Bonilla also signed a card in June. Frasca testified that on July 1, he sent a letter to 1025-1045 Associates requesting negotiations. The letter, dated July 1, 1991, asserts, ''We represent the employees.'' According to Frasca, on July 2 he received a call from a person who identified himself as Hagar and said he was the owner of the premises. Hagar said he had received the letter, that he did not want a union, and that he would not negotiate. Hagar then hung up. Frasca testified that on July 1 or 2 of he filed a petition for representation for the employees with the New York State Labor Relations Board. I note that the date on this petition written in by the notary, a secretary in Frasca's office, is ''2d July'' but it clearly has been altered. The New York State Labor Relations Board records show that the petition of Local 377 was filed on July 10, 1991.

Ralph Sperlin testified that on June 2 there were many tenant complaints about lack of elevator service, lack of hot water, and no lights in the hallways. Sperlin went to the building and spoke to Arteaga, remonstrating with him about the lack of service. Sperlin told Arteaga that floods are commonplace but that Arteaga should have taken steps to correct the situation. Sperlin claimed that on at least a dozen occasions he went to the building looking for Arteaga but did not find him there. Arteaga's wife gave Sperlin different excuses for her husband's absence each time. On about June 10, 1991, Ralph Sperlin took Arteaga to see Victor Soto; Sperlin speaks very little Spanish and he believed that there was a communication gap between him and Arteaga which could be bridged by Soto. With Soto translating, Sperlin told Arteaga that he had to work 5 days per week in the building if he wanted to retain his job and that he had to be available in case of emergencies. According to Sperlin, Arteaga made a ''sour face'' after he received these instructions. Following some prompting by counsel for the Respondent, Ralph Sperlin recalled that at this meeting he had Soto tell Arteaga that he was fired but that he could stay until June 26. According to Sperlin, after June 26 or 27, Arteaga was no longer the super and he performed no work in the building. Sperlin denied having any knowledge of Arteaga's membership in Local 377 when he discharged him. In fact, Ralph Sperlin testified, the first notice he had of Arteaga's union activity was when he received a notice from the Regional Office.[28] Sperlin denied ever receiving the letter dated July 1 from Local 377. Sperlin explained that Hagar's duties involved bookkeeping, preparing the payroll, and collecting unpaid rent. Hagar had no responsibilities for dealing with unions and it would not have been his responsibility to respond to a letter such as the letter purportedly sent by Local 377 on July 1, 1991. Only Sperlin himself would have dealt with a union matter.

Ralph Sperlin testified that when he fired Arteaga, he told Bonilla that he could stay on and work if he wished to do so. Bonilla did in fact remain as the porter until late July or early August when he told Sperlin that he was moving out. Sperlin denied that he ever told Bonilla he suspected him of being a union member and he has no knowledge of any items that may have been taken from Bonilla's possessions in the basement.

4. Discussion and conclusions as to Arteaga and Bonilla

The credibility issues relating to Arteaga's and Bonilla's discharges are difficult to resolve. As indicated above, I did not find that Sperlin was a credible or reliable witness with respect to the terminations of Mitchell and Thompson. The same holds true with respect to the discharge of Arteaga. Sperlin did not testify that at the meeting of June 10, 1991, he instructed Soto to tell Arteaga that he was fired and had to leave after the end of June until he was prompted to do so by counsel for Respondent. Although Arteaga testified specifically that Sperlin told him he had to work on the Fourth of July, Sperlin did not deny Arteaga's version of the incident. If I were to credit Arteaga, I would find that he was not discharged until some time between July 5 and July 8, 1991; this would make sense in light of Arteaga's filing of a charge on July 9, 1991. However, I am hesitant to credit Arteaga in all matters. His testimony about the timing of his visits to Local 377 and the signing of the card and payment of the initiation fee were shifting, inconsistent, and contrary

[26] Bonilla's affidavit states that he and Arteaga went to Local 377 after July 4.

[27] Apparently, Samuel was the replacement for Arteaga.

[28] Arteaga filed a charge on July 9, 1991, in Case 29–CA–15842.

to the documentary evidence. In addition, Frasca's testimony that Arteaga and Bonilla joined the Union in June is contrary to the documentary evidence: the record shows that Bonilla joined on July 8 and Arteaga joined on July 15. Frasca testified that he filed a petition with the State Board on July 2; the evidence shows that the petition was filed on July 10, 1991. I therefore do not believe that Frasca sent a letter to Respondent on July 1, 1991, claiming to represent ''the employees.''[29] I am also unwilling to credit Bonilla about his discharge by Sperlin. First, Bonilla testified that on August 6, 1991, he and Samuel spoke alone and Samuel told him he would be fired in 2 days because he had been at the Union; then Bonilla changed his testimony to say that Sperlin was present and told him ''you problem, the union.'' Bonilla had obviously rehearsed this phrase and I noted that he took care to say it in English at every opportunity. This testimony impressed me as contrived. Further, Bonilla went to great lengths to detail a theft from his room which would have given the intruder access to proof of Bonilla's membership in Local 377. But Bonilla's testimony about this incident was shifting and inconsistent and there is no proof that Respondent was involved in this event.

Based on the above, I find that Sperlin discharged Arteaga after July 4 and by July 8, 1991, because Sperlin believed that Arteaga was not properly performing his duties in the building. I do not find that Sperlin had any notice that Arteaga had contacted Local 377 when Sperlin fired Arteaga. With respect to the discharge of Bonilla, I do not credit his testimony that Sperlin said he was being discharged for union activity. As discussed above, I found Bonilla to be unconvincing. Although I also found Sperlin unconvincing, the General Counsel has the burden of proof in this case and must make out a prima facie case. There has not been any showing that by August 8, 1991, Sperlin was aware that Bonilla had joined Local 377.[30] The General Counsel urges me to find that once Sperlin was aware of Arteaga's union activity, he assumed that Bonilla was also a member of a union; however, I do not find any basis for engaging in this sort of speculation. My finding that Bonilla is not reliable leads me to conclude that the General Counsel has not proven by a preponderance of the evidence that Bonilla was discharged for union activity.

5. Refusal to bargain with Local 32B-32J

The complaint alleges and Respondent admits that when Respondent Associates purchased the building from Blue Star on April 23, 1991, it continued to operate the business in basically unchanged form, hiring as a majority of its employees individuals who were previously employees of Blue Star. I have found above that Mitchell was not a supervisor: therefore, I find that Respondent hired both employees of Blue Star, Mitchell and Thompson, and I find that Respondent is a successor of Blue Star. I find that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part time superintendents and porters employed at 1025-1045 St. John's Place, Brooklyn, New York, excluding all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

There is no dispute that Local 32B-32J was the exclusive collective-bargaining representative of the unit employees when Respondent purchased the building. I find that since April 23, 1991, Local 32B-32J has been the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit described above. The facts make it clear, as does Respondent's answer denying successorship, that Respondent has refused to recognize and bargain with Local 32B-32J as the exclusive collective-bargaining representative of its employees in the appropriate unit. It is immaterial that the Union never requested bargaining; from the first day Ralph Sperlin sought to replace the employees who belonged to the Union with nonunion workers, he informed his employee that he did not want the Union and that he would not pay union wages. Sperlin made it clear that he wanted to be rid of Mitchell and Thompson so that he could be rid of any obligations to bargain with Local 32B-32J. I find that Respondent refused to recognize and bargain with Local 32B-32J in violation of Section 8(a)(5) and (1) of the Act.[31]

CONCLUSIONS OF LAW

1. Respondents Hagar Management Corp. and 1025-1045 Associates, Inc. are joint employers and a successor employer to Blue Star of the employees in the following appropriate unit:

> All full time and regular part time superintendents and porters employed at 1025-1045 St. John's Place, Brooklyn, New York, excluding all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

2. At all material times, Local 32B-32J has been the exclusive representative of the employees in the appropriate unit for purposes of collective bargaining.

3. By refusing since April 23, 1991, to bargain with Local 32B-32J, Respondents have violated Section 8(a)(5) and (1) of the Act.

4. By offering employees Anthony Mitchell and Courtney Thompson sums of money to induce them to resign because they belonged to Local 32B-32J and by discharging them, Respondents violated Section 8(a)(3) and (1) of the Act.

5. The General Counsel has not proved that Respondents engaged in any unfair labor practices other than those found here.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[29] Because Frasca impressed me as such an unreliable witness, I cannot make any finding that this letter was ever sent.

[30] I note that I did not credit Frasca's testimony about the date he sent the letter which is dated July 1, 1991. Sperlin denied ever seeing this letter. Although Local 377 filed its petition with the State Board on July 10, there is no proof of when, if ever, it was served on Respondent.

[31] *Tilden Arms Management Co.*, 276 NLRB 1111, 1117 (1985).

Having discriminatorily discharged employees, Respondents must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondents, Hagar Management Corp. and 1025-1045 Associates, Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Offering its employees sums of money to induce them to resign and discharging its employees because they belong to Local 32B-32J or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Offer Anthony Mitchell and Courtney Thompson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Remove from Respondents' files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at the building in Brooklyn, New York, copies of the attached notice marked ''Appendix.''[33] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[32] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT offer you money to resign and WE WILL NOT discharge any of you for supporting Local 32B-32J or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full time and regular part time superintendents and porters employed at 1025-1045 St. John's Place, Brooklyn, New York, excluding all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL offer Anthony Mitchell and Courtney Thompson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

HAGAR MANAGEMENT CORP. AND 1025-1045 ASSOCIATES, INC.